

STATE OF RHODE ISLAND

KENT, SC.

SUPERIOR COURT

(FILED: October 24, 2022)

MKG BEAUTY & BUSINESS, LLC;
M&N REALTY, LLC;
V&J REALTY, LLC; MICHAEL K.
GALVIN; AND NINA M. GALVIN,

Plaintiffs,

v.

INDEPENDENCE BANK,

Defendant.

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C.A. No. KC-2019-1354

DECISION

LICHT, J. Defendant Independence Bank (Defendant or Bank) moves for summary judgment on the remaining counts in the Verified Complaint filed by Plaintiffs MKG Beauty & Business, LLC (MKG); M&N Realty, LLC (M&N); V&J Realty, LLC (V&J); Michael K. Galvin (Mr. Galvin); and Nina M. Galvin (Mrs. Galvin) (collectively referred to as the Plaintiffs). Defendant also moves for summary judgment on its Counterclaim against Plaintiffs for the unpaid balance of a promissory note dated June 11, 2013, plus reasonable attorneys' fees and costs. Plaintiffs object to both motions. The Court heard arguments on September 19, 2022.

I

Facts and Travel

MKG operated beauty schools in properties located at 379 Atwood Avenue (379 Atwood) and 395 Atwood Avenue (395 Atwood) in Cranston, Rhode Island (collectively referred to as the Properties). (Verified Compl. ¶ 16.) To refinance the Properties and provide some working capital for the schools, on June 11, 2013, the Bank lent MKG, M&N, and V&J \$2,760,000 (the Loan). (Def.'s Mot. for Summ. J. (Def.'s Mot.) Exs. A, M (Yentsch Aff.) ¶ 4.) The Loan was guaranteed by the United States Small Business Administration (SBA) and was evidenced by a Promissory Note (the Note) executed by MKG, M&N, and V&J (collectively referred to sometimes as the Borrowers) which was secured by mortgages (the Mortgages) granted by M&N and V&J on the Properties. (Def.'s Mot. Exs. A, C-D.) As additional security for the Note, Mrs. Galvin assigned a \$1,000,000 life insurance policy on her life. (Galvin Dep. Tr. 86:23-87:9, Dec. 14, 2021.) Unfortunately, Mrs. Galvin passed away and this Court ordered all proceeds from the life insurance policy to be deposited into the Registry of the Court pending further findings and orders by the Court. (Order dated September 22, 2020.)

For MKG to succeed and to be able to make payments due on the Note, it needed to be accredited as a beauty school by the National Accrediting Commission of Career Arts & Sciences (NACCAS). (Yentsch Aff. ¶ 4.) With such accreditation, MKG's students could obtain federal student loans and thus pay their tuition which was MKG's primary source of revenue. *Id.*

At the time the Loan was made, Defendant set aside in escrow \$200,000 in funds from the Loan proceeds to cover the first year's interest only loan payments. (Verified Compl. ¶ 13.) For reasons immaterial to the Court, MKG's accreditation was delayed until September 16, 2014, and federal student loan approval followed thereafter on December 16, 2014. (Yentsch Aff. ¶ 5.) By

this time, however, MKG no longer had the funds to meet its obligations under the Note. *Id.* Therefore, to assist Plaintiffs, the Bank agreed to defer, until the end of the term of the Note, the payments due for the period between July 1, 2014 and September 1, 2014. *Id.* ¶ 6. However, despite this three-month grace period, Plaintiffs remained unable to make its monthly payments and as a result, per Defendant's request, the SBA purchased its deferred participation of the Note on January 15, 2015. *Id.*

In February 2016, Plaintiffs entered into an agreement (the Workout) with Defendant "in an attempt to work out the problems with the defaulted SBA Loan." *Id.* ¶ 7. As part of the Workout, M&N and V&J executed Deeds-in-Lieu of Foreclosure (the Deeds-in-Lieu) transferring the Properties to the Bank. (Def.'s Mot. Exs. E-F.) Mr. Galvin and Mrs. Galvin (collectively referred to as the Galvins) allege that they executed the Deeds-in-Lieu based on the statements of Defendant's President, Robert Catanzaro (Mr. Catanzaro), that if they consolidated the beauty school and skin school into one location at 379 Atwood, he would provide "additional fund[ing] to renovate the area where the skin program would run." (Verified Compl. ¶ 16.) The Galvins further allege that Mr. Catanzaro informed the Galvins that the proceeds from the sale of 395 Atwood, after payment of taxes and expenses, would be used to offset the Loan and hopefully "provide the Plaintiffs with some extra cash." *Id.* ¶ 17; *see* Pls.' Opp'n to Def.'s Mot. Summ. J. (Pls.' Opp'n) Ex. A. Thus, the Galvins executed the Deeds-in-Lieu. (Verified Compl. ¶ 18.)

On or around July 7, 2017, Defendant sold 395 Atwood for \$450,000. *Id.* ¶ 22. However, Plaintiffs allege that at the time the Deeds-in-Lieu were executed, Defendant never provided Plaintiffs with any credit for the fair market value (FMV) of 395 Atwood against the Loan balance. *Id.* ¶ 20. Rather, sometime thereafter, Defendant credited the remaining balance from the sale to the Loan. *Id.* ¶ 22. Plaintiffs further allege that after taking ownership of 395 Atwood, Defendant

made a series of payments on the property and then charged all payments to Plaintiffs' account. *Id.* ¶¶ 28-37. Accordingly, Plaintiffs aver that Defendant wrongfully deducted \$73,312.62 from the sale proceeds of 395 Atwood. *Id.* ¶ 38.

In furtherance of the Workout, MKG also executed a lease (the Lease) with Defendant providing for MKG's use and occupancy of 379 Atwood. *Id.* ¶ 41; *see* Def.'s Mot. Ex. G. MKG's payment and performance under the Lease were personally and unconditionally guaranteed by the Galvins. (Def.'s Mot. Ex. G at 17.) The terms of the Lease did not require MKG to pay the property taxes. However, according to Mr. Catanzaro, the rental payments to Defendant were designed to cover the monthly payments due on the Note, as well as anticipated insurance and taxes. (Catanzaro Dep. Tr. 21:1-24:3, Jan. 28, 2022.)

MKG eventually defaulted on its monthly rental payment obligations under the Lease for the period between May 2019 to October 2019. (Yentsch Aff. ¶ 18.) Up until this point, MKG had remained in possession of 379 Atwood and continued to operate its beauty and skin schools from that location. (Galvin Dep. Tr. 12:1-13:16, Dec. 14, 2021.) After Plaintiffs failed to cure the default, Defendant commenced an eviction action in the Third Division District Court seeking possession of the property and back rent. (Yentsch Aff. ¶ 19.) Plaintiffs responded by, *inter alia*, filing this Verified Complaint seeking to enjoin Defendant from moving forward with its eviction. (Verified Compl. ¶¶ 75-86.) MKG was subsequently evicted from 379 Atwood and ceased operations completely as of April 2021. (Galvin Dep. Tr. 13:23-14:2, Dec. 14, 2021.) Sometime after MKG was evicted from 379 Atwood, MKG made an offer to purchase the property for approximately \$1,100,000. *Id.* at 14:3-16:19. However, MKG's offer was denied, and Defendant later sold 379 Atwood at public auction for \$815,000. (Yentsch Aff. ¶ 21.)

On December 4, 2019, Plaintiffs filed their Verified Complaint advancing claims for (Count I) Declaratory Judgment (V&J – 395 Atwood); (Count II) Declaratory Judgment (M&N – 379 Atwood); (Count III) Declaratory Judgment (V&J – 395 Atwood); (Count IV) Usury Pursuant to R.I. Gen. Laws § 6-26-2; (Count V) Affirmative Injunctive Relief (M&N – 379 Atwood); (Count VI) Injunctive Relief; (Count VII) Common Law Fraud; (Count VIII) Fraudulent Misrepresentation; (Count IX) Unjust Enrichment; (Count X) Intentional Infliction of Emotional Distress; (Count XI) Negligent Infliction of Emotional Distress; (Count XII) Breach of Contract; and (Count XIII) Violations of R.I.G.L. § 7-15-1, *et. seq.*, (the “RICO Act”). Defendant filed a Motion to Dismiss on December 9, 2019 which was later converted to one for summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure and was heard on April 19, 2021. At that time, this Court granted partial summary judgment in favor of Defendant on Counts I, II, V, and VIII, and denied summary judgment on Counts III, IV, VI, VII, IX, X, XI, XII, and XIII.

The parties then engaged in fact discovery, and Defendant now moves for summary judgment on the remaining counts and additionally requests that summary judgment be granted on its counterclaim against Plaintiffs for the unpaid balance on the Note, plus reasonable attorneys’ fees and costs. The Court heard arguments on September 19, 2022, at which time Plaintiffs’ counsel conceded Counts VI, X, XI, and XIII. Thus, the only issues left for this Court to address is whether Defendant is entitled to summary judgment on Counts III, IV, VII, IX, and XII, as well as its Counterclaim.

II

Standard of Review

“Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.” *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 451 (R.I. 2013) (internal quotation omitted). “[S]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the Court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Education*, 93 A.3d 949, 951 (R.I. 2014) (internal quotations omitted); *see* Super. R. Civ. P. 56. The moving party “bears the initial burden of establishing the absence of a genuine issue of fact.” *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (citation omitted). Then the burden shifts and, as reiterated by the Rhode Island Supreme Court recently:

“The party opposing summary judgment bears the burden of proving, by competent evidence, the existence of facts in dispute. The opposing party will not be allowed to rely upon mere allegations or denials in the pleadings but rather, by affidavits or otherwise the opposing party has an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact.” *Henry v. Media General Operations, Inc.*, 254 A.3d 822, 834 (R.I. 2021) (cleaned up, citations omitted).

In deciding a motion for summary judgment, the Court “views the evidence in the light most favorable to the nonmoving party[.]” *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013), and “does not pass upon the weight or the credibility of the evidence[.]” *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992).

III

Analysis

A

Plaintiffs' Claim

i

Count III – Declaratory Relief for 395 Atwood

The first issue is whether there exists a genuine issue of material fact that Defendant did not sell 395 Atwood in a commercially reasonable manner. Defendant argues that Plaintiffs have failed to provide any evidence that supports a finding that the sale price of \$450,000 for 395 Atwood was not commercially reasonable. (Def.'s Mot. at 25.) Conversely, Plaintiffs argue that "the sale price" of \$450,000 for 395 Atwood alone establishes that it was not sold in a commercially reasonable manner or, at the very least, creates a genuine issue of material fact as to the commercial reasonableness of the sale. (Pls.' Opp'n at 7.)

Under Rhode Island law, a mere discrepancy between a market value appraisal and a foreclosure sale price, without more, is not sufficient to establish that a transaction is commercially unreasonable. *DeLuca v. Klegraeffe*, 706 A.2d 1351, 1352 (R.I. 1998) (citing *Woolley v. Tougas*, 61 R.I. 434, 438, 1 A.2d 92, 93 (1938)). "The primary focus of whether a sale is commercially reasonable 'is not the proceeds received from the sale but rather the procedures employed for the sale.'" *General Motors Acceptance Corp. v. Johnson*, 746 A.2d 122, 124 (R.I. 2000) (quoting *In re Zsa Zsa Ltd.*, 352 F. Supp. 665, 671 (S.D.N.Y. 1972)).

In *DeLuca*, the Rhode Island Supreme Court upheld the lower court's grant of summary judgment in an action for a deficiency on a promissory note. *DeLuca*, 706 A.2d at 1351. In that case, the plaintiff held a promissory note, secured by a second mortgage, and personally guaranteed

by the defendant. *Id.* After default, the property was foreclosed and the plaintiff purchased the property at public auction, and subsequently sued the defendant for the deficiency amount of the note. The plaintiff prevailed on a motion for summary judgment. *Id.* The defendant objected and, relying on two recent appraisals of the property, argued that the sale was not commercially reasonable. *Id.* The Court explained that although evidence of price disparities between appraisal values and foreclosure sales is persuasive, inadequacy of price cannot “alone supply a sufficient reason to attack the integrity of the sale.” *Id.* at 1352 (citing *Woolley*, 61 R.I. at 438, 1 A.2d at 93). Rather, the maker or guarantor of the note bears the burden of producing evidence of impropriety, such as “collusion...in connection with the advertisement or conduct of the sale that would have improperly deflated the foreclosure price.” *Id.*

The Supreme Court of Rhode Island addressed the issue of commercial reasonableness again two years later in *General Motors Acceptance Corp.*, explaining that the primary focus of whether a sale is commercially reasonable is the procedures employed, not the proceeds received from the sale. *General Motors Acceptance Corp.*, 746 A.2d 122. In that case, the defendant was in a car accident and ceased making car payments. *Id.* at 123. As a result, the defendant’s car was repossessed and sold, without being repaired, for \$8,500 at a private auction resulting in a deficiency of \$12,479.93. *Id.* The defendant objected to the plaintiff’s motion for summary judgment on the ground that the sale of the car was not commercially reasonable. *Id.* Although the lower court granted the plaintiff’s motion for summary judgment, the Supreme Court reversed the holding explaining that the plaintiff failed to allege facts to prove the car was sold in a commercially unreasonable manner and, therefore, failed to meet its burden under Rule 56. *Id.* at 124.

Defendant has presented substantial evidence to support a finding that, in accordance with both *DeLuca* and *General Motors Acceptance Corp.*, it sold 395 Atwood in a commercially reasonable manner. *DeLuca*, 706 A.2d at 1351; *see General Motors Acceptance Corp.*, 746 A.2d at 124. Notably, Defendant has provided competent evidence indicating that it was both ready and willing to accept private offers and that, by no fault of Defendant, both prospects failed. Specifically, the affidavit of Timothy J. Yentsch (Mr. Yentsch), Vice President of Defendant, and the testimony of Mr. Catanzaro provide clarity on the “procedures employed” leading up to 395 Atwood’s final sale. (Yentsch Aff. ¶ 16.) (Catanzaro Dep. Tr. 30:14-32:3, Jan. 28, 2022.); *see General Motors Acceptance Corp.*, 746 A.2d at 124. Specifically, prior to public auction, Defendant had one offer and one prospective offer for 395 Atwood. (Yentsch Aff. ¶ 16.) The first offer was by 1218 Associates in the amount of \$750,000 which was later withdrawn due to financing and structural difficulties. *Id.* The prospective offer was from a “doctor group” which quickly recoiled after learning about the \$750,000 minimum requirement. *Id.* As a result of the unsuccessful attempts to sell 395 Atwood and an unsuccessful public auction in December 2016, a low reserve was set for the upcoming May 2017 public auction. *Id.* At that time, Defendant received only one bid for 395 Atwood, which is the bid at issue before this Court. *Id.*

On the other hand, the only evidence that Plaintiffs have set forth in support of their position is the fact that 395 Atwood sold for less than its assessed value for property taxes. (Pls.’ Opp’n at 7; *see* Pls.’ Opp’n Ex. B.) However, as evidenced by both *DeLuca* and *General Motors Acceptance Corp.*, selling a property at a value less than what it is appraised or assessed at is not enough. Plaintiffs have failed to present any evidence indicating collusion or impropriety on the part of Defendant with respect to accepting a sale price of \$450,000. *See DeLuca*, 706 A.2d at 1352. Plaintiffs have neither advanced expert appraisal regarding the value of 395 Atwood at the

time of the public auction nor have Plaintiffs provided any other substantive grounds as to why \$450,000 was insufficient. Moreover, Plaintiffs have provided no evidence that the procedures employed by Defendant were commercially unreasonable. *See General Motors Acceptance Corp.*, 746 A.2d at 124.

Furthermore, this Court finds that the unambiguous language of Section 9G of the Note supports a finding that no dispute exists as to Defendant's liability to Plaintiffs for its failure to secure the FMV of 395 Atwood at the time of sale. Section 9G of the Note provides in part, "Borrower also waives any defenses based upon any claim that Lender did not...obtain the fair market value of Collateral at a sale." (Def.'s Mot. Ex. A, Section 9G.) Plaintiffs, in their written or oral objections to the motion, have failed to provide any reason as to why this section should be ignored. Thus, viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs have failed to show by competent evidence that a genuine issue of material fact exists as to the commercial reasonableness of the 395 Atwood sale. *See Mruk*, 82 A.3d at 532.

ii

Count IV – Usury Pursuant to G.L. 1956 § 6-26-2

Next, the Court must address whether there exists a genuine issue of material fact that Defendant charged Plaintiffs an interest rate in excess of 21 percent, thus violating Rhode Island's usury law. Under Rhode Island usury law:

"[N]o person, partnership, association, or corporation loaning money to or negotiating the loan of money for another, except duly licensed pawnbrokers, shall, directly or indirectly, reserve, charge, or take interest on a loan, whether before or after maturity, at a rate that shall exceed the greater of twenty-one percent (21%) per annum or the alternate rate specified in subsection (b) of this section of the unpaid principal balance of the net proceeds of the loan not compounded, not taken in advance, nor added on to the amount of the loan." G.L. 1956 § 6-26-2(a).

Defendant argues that the transactions between itself and Plaintiffs can be viewed in one of two ways, either with respect to the Note or with respect to the Lease, but neither can be deemed usurious under Rhode Island law. (Def.'s Mot. at 32.) As to the Note, Defendant argues that Plaintiffs fail to provide any evidence indicating that they were ever charged interest even close to 21 percent. *Id.* With respect to the Lease, Defendant argues it is exactly what it sounds like it is – a lease of real estate and, therefore, it cannot be subject to Rhode Island's usury laws. *Id.*

Plaintiffs argue that in exchange for the Workout, Plaintiffs had to (1) provide repayment of the principal amount of \$2,700,000; (2) pay interest on the principal amount; (3) surrender the Properties without any deduction on the loan balance; and (4) enter into the Lease. (Pls.' Opp'n at 12.) Taken altogether, Plaintiffs assert that the stipulations imposed upon them created a usurious loan, requiring them to pay interest at a greater rate than 23 percent per annum. *Id.* at 8.

“When determining whether a transaction is a loan or other business transaction, we focus on the substance over the form of the transaction and examine all the facts and circumstances that reveal the true nature of the transaction.” *Holden v. Salvadore*, 964 A.2d 508, 513 (R.I. 2009) (citing *Lancia v. Grossman's of Rhode Island, Inc.*, 100 R.I. 407, 411-12, 216 A.2d 517, 520 (1966)). “Ultimately, the existence of a loan is a question of fact.” *Id.* (citing *West Pico Furniture Co. of Los Angeles v. Pacific Finance Loans*, 469 P.2d 665, 671 (Cal. 1970)). “The factual inquiry pertains to ‘whether the parties intended to create a debtor-creditor relationship.’” *Id.* (quoting *Kjar v. Brimley*, 497 P.2d 23, 26 (Utah 1972)). For transactions involving the option to repurchase, courts also look to the “intention of the parties at the time of the transaction” to determine whether the transaction is a loan or just a sale with an option to repurchase. *Id.* at 514 (citing *Kawauchi v. Tabata*, 413 P.2d 221, 227-28 (Haw. 1966)).

Under Rhode Island law, the general rule is that “usury is determined by the terms of the note at the time of its execution, and that a debtor by his voluntary act cannot render usurious that which but for such act would be free from usury.” *Industrial National Bank of Rhode Island v. Stuard*, 113 R.I. 124, 127-28, 318 A.2d 452, 454 (1974) (citing *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833)). Accordingly, “[w]here by the terms of the contract payment by the time certain may avoid usury, the contract is not usurious . . .” *Id.* at 128, 318 A.2d at 454 (quoting *Crider v. San Antonio Real Estate Building & Loan Association*, 37 S.W. 237, 238 (Tex. 1896), *aff’d* 35 S.W. 1047 (1896)).

Defendant has produced evidence indicating that at the time the Note was executed in 2013, it had an initial interest rate of 6 percent and, although it could vary over time, the interest rate was set at the prime rate plus 2.5 percent. (Def.’s Mot. Ex. A.) Moreover, Defendant asserts that when the SBA purchased its guaranteed portion of the Loan in 2015, the interest rate became fixed at 6 percent per annum. (Def.’s Mot. at 32.) Plaintiffs, on the other hand, have set forth no evidence supporting their contention that they have paid interest at a greater rate than 23 percent per annum. (Pls.’ Opp’n at 8.). Plaintiffs have raised questions about the application of the proceeds of the sale of the Properties and about the allocation of payments made under the Lease, questions which will be discussed below. However, other than the bald assertion¹ that they would present an expert at

¹ At oral arguments, the Court requested a summary accounting of the expenses paid by the Bank and a calculation of the amount due under the Loan. When it was submitted, Plaintiffs’ counsel requested an opportunity to respond to the new information which this Court agreed to as long as the response related to the submission by Defendant’s counsel and was submitted prior to October 17, 2022, the date the Court set for deliverance of a bench decision. On September 30, 2022 and October 3, 2022, Defendant’s counsel provided the Court and Plaintiffs’ counsel with various Excel spreadsheets summarizing the payments made under the Loan. The Court later determined that it would issue a written, rather than bench, decision and so informed both parties of the update in e-mail correspondence dated October 11, 2022. In response, Plaintiffs’ counsel again asked if she could submit a response which the Court again permitted as long as it was submitted as soon as possible. On October 17, 2022, Plaintiffs’ counsel submitted an affidavit by Mr. Parmelee in

trial to establish that the Plaintiffs were charged 23 percent per annum, Plaintiffs have failed to meet their burden on summary judgment.

On summary judgment, the moving party has to establish there are no genuine issues of material fact and that they are entitled to judgment. Once the moving party meets its burden, the nonmoving party, by competent evidence, must show that there is a genuine issue of material fact. It is not sufficient to contend that the evidence will be forthcoming at the trial. If there is such an expert, it was incumbent on the Plaintiffs to produce his or her opinion now. Thus, Plaintiffs have failed to show by competent evidence that a genuine issue of material fact exists as to whether Defendant charged an interest rate greater than 21 percent. *See Mruk*, 82 A.3d at 532.

iii

Count VII – Common Law Fraud

The third issue this Court must address is whether there exists a genuine issue of material fact that Mr. Catanzaro’s statement to the Galvins regarding the sale of 395 Atwood amounted to common law fraud. Defendant argues that Plaintiffs merely recite the elements of common law fraud in their Verified Complaint and fail to plead with particularity the facts of the alleged fraud pursuant to Rule 9(b) of the Superior Court Rules of Civil Procedure. (Def.’s Mot. at 34.)

Plaintiffs counter that prior to the Release being executed, Mr. Catanzaro represented to Plaintiffs that he thought he could sell 395 Atwood at a high enough price to “satisfy the SBA and give [Plaintiffs] some extra cash.” (Pls.’ Opp’n at 13.) However, as explained above, Defendant

response to the post-hearing submissions by Defendant’s counsel. However, this Court finds that Plaintiffs’ submission is nonresponsive to Defendant’s post-hearing evidence but is instead a post-hearing attempt to introduce expert evidence on the issue of usury. The Amended Scheduling Order entered on January 4, 2022 required expert disclosure by February 15, 2022 with expert depositions conducted on or before March 15, 2022. Thus, the time for the submission of this affidavit has long since expired. Defendant has had no opportunity to depose Mr. Parmelee and, therefore, this Court will not consider the affidavit.

sold 395 Atwood for \$450,000. *Id.* Accordingly, Plaintiffs assert that Defendant's statement regarding the sale of 395 Atwood amounted to fraud because Plaintiffs "reasonably and detrimentally relied" on the statement in executing the Deeds-in-Lieu, the Release, and the Lease, and that Defendant did not intend to, and did not, honor such statement. *Id.*

However, this Court already granted partial summary judgment in favor of Defendants in its prior Order, leaving "open the possibility that Plaintiffs might be able to demonstrate some entitlement to relief if they could prove misrepresentations by [Defendant] occur[ed] after the execution of the Release." (Def.'s Mot. at 34.) Thus, because Plaintiffs' argument is based on the alleged fraudulent occurrences surrounding the Deeds-in-Lieu, which occurred before the Release, there is no evidence to suggest that any alleged misrepresentations occurred after the Release.

Even if the e-mail correspondence between Mr. Catanzaro and the Galvins regarding the sale of 395 Atwood were after the Release, the Court is not persuaded that a statement from Mr. Catanzaro expressing a hope to sell the property for a high amount and the unfortunate inability to meet that expectation amounts to fraud. At oral argument, counsel for Plaintiffs conceded that in terms of additional proof, they had none, and without more evidence suggesting that Mr. Catanzaro made false statements after the Release, this Court finds that Plaintiffs have failed to meet their burden of producing competent evidence indicating that a genuine issue of material fact exists. *Mruk*, 82 A.3d at 532.

iv

Count IX – Unjust Enrichment

The fourth issue before the Court is whether there exists a genuine issue of material fact that Defendant was unjustly enriched by Plaintiffs' payments. Defendant argues that Plaintiffs have provided no evidence to support a finding that Defendant has been unjustly enriched. (Def.'s

Mot. at 38.) Conversely, Plaintiffs argue that Defendant has been unjustly enriched as a result of its: (1) continued collection of loan payments; (2) acquisition of the Properties; (3) charging of interest on the Loan; and (4) requested payoff of \$2,700,000. (Pls.' Opp'n at 14.) Furthermore, Plaintiffs assert that if this Court grants summary judgment in favor of Defendant, it would also be granting a windfall as a result of Defendant obtaining the Properties, selling the Properties, failing to credit Plaintiffs with the FMV of the Properties, and then charging Plaintiffs interest on the entire Loan balance. *Id.*

“Unjust enrichment is ‘[t]he retention of a benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected.’” *South County Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 210 (R.I. 2015) (quoting Black’s Law Dictionary 1771 (10th ed. 2014)). Under Rhode Island law, “[t]o recover for unjust enrichment, a claimant must prove: (1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.” *Id.* at 210-11 (quoting *Emond Plumbing & Heating, Inc. v. BankNewport*, 105 A.3d 85, 90 (R.I. 2014)).

Neither party disputes that Plaintiffs made monthly payments to Defendant under the Lease and Defendant received the net proceeds of the sale of the Properties. However, while these payments benefitted the Defendant, they also benefitted the Plaintiffs as all payments were allocated to the Plaintiffs’ obligations under the Lease, the Note, and the Mortgages. (Catanzaro Dep. Tr. 23:5-24:3, Jan. 28, 2022.) Whether these payments were allocated to the correct obligations will be discussed below. Although how these payments were allocated may affect the balance which Plaintiffs owe the Defendant, they do not provide evidence of unjust enrichment.

Thus, this Court finds that viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs have failed to show by competent evidence that a genuine issue of material fact exists as to Count IX. *Mruk*, 82 A.3d at 532.

v

Count XII – Breach of Contract

The last issue before this Court in the Verified Complaint is whether a genuine issue of material fact exists as to whether Defendant’s charges of taxes and insurance amount to a breach of contract under the Lease. Defendant argues that these were obligations under the Mortgages. (Def.’s Mot. at 44.) Each Deed-in-Lieu specifically stated in bold letters, “**This conveyance does not completely satisfy all obligations under the Mortgage.**” (Def.’s Mot. Exs. E-F.) Furthermore, Mr. Galvin, on behalf of V&J and M&N, executed Estoppel Affidavits² which stated in bold letters “**that there was good and sufficient consideration for the Deed, however, said consideration was not a full cancellation of all non-monetary obligations nor full cancellation of all sums, costs and charges secured by the Mortgage.**” (Def.’s Mot. Exs. H-I.) Defendant contends that once MKG defaulted under the Lease, the real estate taxes and/or the insurance charges were added to the principal balance of the Loan because “the rent was in part intended to be used to pay real estate taxes.” (Def.’s Mot. at 43.)

The payments under the Note were \$17,783 per month or \$213,396 per year. In reviewing schedules provided by the Bank after oral argument, taxes and sewer fees approximated \$50,000 per year. Thus, annual payments under the Note and the Mortgages exceed \$260,000. The Lease commenced as of February 1, 2016, and the first year’s rent was \$117,672. (Verified Compl. ¶ 42.)

² Exhibits H&I to Defendant’s Motion are identical, and the Court presumes this was an inadvertent error and that M&N executed a similar affidavit.

The second year's rent was \$229,800; the third year's rent was \$252,000; and the fourth year's rent was \$252,000. *Id.* Therefore, the Court has trouble accepting Defendant's contention that the rent was to be used to pay real estate taxes and other charges. However, Plaintiffs' argument does not constitute a breach of contract as the Lease had terminated when the taxes were applied to the rent. Rather, the application of rent to taxes and other charges is an issue that affects the amount due under the Note and will be discussed below. Consequently, the Court finds no genuine issue of material fact as to the alleged breach of contract.

B

Defendant's Counterclaim

On May 11, 2021, Defendant filed its Answer to Plaintiffs' Verified Complaint along with a Counterclaim. (Def.'s Answer and Counterclaim.) Defendant requests that this Court enter judgment in its favor for the full amount of monetary damages which resulted from the breach of contract and unjust enrichment, plus interest, fees, and expenses, including, but not limited to, reasonable attorneys' fees as provided for in the Note. *Id.* at 25-26. Additionally, Defendant requests that this Court confirm the Conditional Assignment of Mrs. Galvin's life insurance proceeds currently held in the Registry of the Court so that Defendant may apply those proceeds in partial satisfaction of a Judgment. *Id.* at 25. In regard to the breach of contract counterclaim, Defendant asserts that Plaintiffs have failed to "tender the balance due under the Note." *Id.* at 25. Moreover, in regard to the unjust enrichment counterclaim, Defendant contends that it "extended credit to [Plaintiffs] fully expecting that it would be repaid for the monies" and Plaintiffs' "retention of the benefit of the funds received without compensating [Defendant] is unjust and inequitable." *Id.* at 26. Plaintiffs, on the other hand, argue that summary judgment is not appropriate as genuine issues of material fact exist. (Pls.' Opp'n at 16.) Moreover, Plaintiffs assert

that Defendant has failed to provide evidence (e.g., an accurate payoff statement) for the alleged balance of the Note and, therefore, summary judgment should be denied. *Id.*

According to an SBA Loan Summary submitted by Defendant, the remaining balance due on the Loan, to include accrued interest as of May 18, 2022 at a per diem rate of \$216.90, late fees, and outstanding expenses, is \$2,411,507.23. (Yentsch Aff. ¶ 23.) (Def.'s SBA Loan Summary.) While, post oral argument, Defendant has provided extensive data about receipts and expenses and has summarized what it believes it is owed, the Court believes there are genuine issues of material fact as to the Bank's allocation of receipts and, thus, the actual amount due. While the Court was provided with the Deeds-in-Lieu and the Lease, there appears to be no document reflecting the parties' understanding of the complete terms of the Workout. The Court's concern is how interest was calculated. Was the principal balance reduced at the time the Bank received the Deeds-in-Lieu? If not, why not?

Defendant says it did not charge the taxes and other expenses until the Lease was in default. (Def.'s Mot. at 43.) If the rent paid under the Lease was to constitute payments under the Note, why was that not done at the time each rental payment was received? If that was done, then when the Lease default occurred, there would have been no funds against which to apply those expenses. Moreover, Defendant contends that the taxes and other expenses were obligations under the Mortgages, and the Court concurs. However, the tenant, MKG, was not a maker of either mortgage. So, would not those unpaid items be added to the principal balance of the Note as the Note authorizes in Section 6B and as the Mortgages provide in Section 3 (III) on the top of page 5? The Note provides, "Lender will apply each installment payment first to pay interest accrued to the day Lender receives the payment, then to bring principal current, then to pay any late fees, and will

apply any remaining balance to reduce principal.” (Def.’s Mot. Ex. A, Section 3.) Again, what is the basis for charging these expenses against the rent?

The Court also has issues with the legal expenses. First, no affidavit, as is customarily required in these matters, appears in the record. More importantly, while the Plaintiffs are liable for the costs of collection pursuant to Section 6B of the Note, what is the basis for their liability for the legal costs incurred by the Bank in the eviction action or in defending this action?

The Court by raising these questions is not limiting the issues that may be raised in a trial on the Counterclaim. It points out these questions to demonstrate that there are genuine issues of material fact as to the balance due under the Note.

IV

Conclusion

For the above-stated reasons, this Court **GRANTS** Defendant’s Motion for Summary Judgment on Counts III, IV, VII, IX, and XII and denies Defendant’s Motion for Summary Judgment on its Counterclaim. Counsel will confer and present the appropriate order. The parties will also schedule a conference with the Court to be held within ten days of this decision to schedule a trial on the Counterclaim.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **MKG Beauty & Business, LLC., et al. v. Independence Bank**

CASE NO: **KC-2019-1354**

COURT: **Kent County Superior Court**

DATE DECISION FILED: **October 24, 2022**

JUSTICE/MAGISTRATE: **Licht, J.**

ATTORNEYS:

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For Defendant: **Steven E. Snow, Esq.**